IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NIGEL VINCENT ARCHIBALD	:	CIVIL ACTION
v.	:	
IMMIGRATION & NATURALIZATION SERVICE	:	NO. 02-0722

MEMORANDUM AND ORDER

HUTTON, J. July 1, 2002

Currently before the Court is Nigel Vincent Archibald's Petition for Writ of Habeas Corpus (Docket No. 2) and Memorandum of Law in Support thereof, the Government's Response to Archibald's Petition for Writ of Habeas Corpus (Docket No. 4), Archibald's Motion in Support of his Petition for Writ of Habeas Corpus (Docket No. 9) and Archibald's Motion for Change of Custody Status (Docket No. 8). For the reasons stated below, Archibald's Petition for Writ of Habeas Corpus is granted in part; denied in part.

I. FACTUAL BACKGROUND

In this pro se alien habeas corpus case, Petitioner Nigel Vincent Archibald ("Archibald") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging a Removal Order that has been entered against him by the Immigration and Naturalization Service ("INS"). Born in Antigua on February 24, 1973, Archibald entered the United States through St. Croix on August 21, 1982 and was admitted as a permanent resident alien. On November 3, 1994,

Archibald was arrested in New York City for a drug trafficking offense and was charged under New York law with criminal possession of a controlled substance in the fifth degree. Archibald was again arrested on February 27, 1994 for armed robbery and was charged with robbery in the second degree. On May 19, 1994, Archibald pled guilty to both offenses and was sentenced to a term of not less than 3 ½ years and a maximum of seven years incarceration for the November 1994 drug charge and to a term of not less than five years and a maximum of ten years for the February 1994 robbery. Archibald was to serve his sentences consecutively.

On September 9, 1994, while Archibald was serving his sentence at the Franklin Correctional Institution in Malone, New York, the INS issued Archibald an Order to Show Cause, then the charging document in deportation proceedings. The Order alleged that Archibald was deportable under subsections 241(a)(2)(A)(iii) and 241(a)(2)(B)(i) of the Immigration and Naturalization Act of 1952 ("INA") as amended, 8 U.S.C. § 1251(a)(2)(A)(iii), (a)(2)(B)(i), as both an "aggravated felon" and as an alien who had been convicted of a controlled substance violation. Archibald's initial deportation hearing, held on December 13, 1994, was continued in order to permit Archibald to retain counsel. Archibald next appeared in immigration court on February 10, 1995, and was again unrepresented by counsel. During this appearance, the immigration judge ("IJ") found Archibald deportable, but advised Archibald that

he could seek relief from removal under section 212(c) of the INA.[1]

On September 20, 1995, Archibald again appeared pro se before the IJ to proceed on the merits of his application for section 212(c) waiver, but the case was adjourned so that Archibald could secure the testimony of his family members. When Archibald completed his testimony regarding his application for section 212(c) relief on October 24, 1996, the INS attorney requested that the IJ suspend the section 212(c) hearing in light of the changes that were made to section 212(c) by the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified in relevant part at 8 U.S.C. § 1182 (1996)), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in relevant part at 8 U.S.C. §§ 1101, 1182, 1224, 1229, 1230, and 1252 (1996)). In a written

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[1] Before it was amended and repealed in 1996, section 212(c) of the INA provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (d) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c) (repealed 1996). Although on its face section 212(c) applied only to exclusion proceedings, it was later held to cover deportation proceedings as well. INS v. St. Cyr, 533 U.S. 289, 295, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

opinion issued on March 19, 1997, the IJ concluded that, due to the passage of section 440(d) of the AEDPA, Archibald was not entitled to seek a waiver of deportation under section 212(c) and ordered Archibald deported. See Resp't Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus (filed under Civ. A. No. 01-7663, E.D.N.Y. Jan. 30, 2002), Ex. 6.

Archibald appealed to the Board of Immigration Appeals ("BIA"), but the Board sustained the deportation order on August 18, 1997. See id. at Ex. 8. Archibald later appealed to the BIA to reopen his case following the Second Circuit's decision in St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000), aff'd 533 U.S. 289 (2001), in which the court held that section 440(d) of the AEDPA did not apply to pending section 212(c) waiver applications. The BIA, however, declined to reopen Archibald's case. See Resp't Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus (filed under Civ. A. No. 01-7663, E.D.N.Y. Jan. 30, 2002), Ex. 9. The State of New York then released Archibald to the INS for deportation on October 5, 2001. Archibald filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on December 20, 2001 in the United States District Court for the Eastern District of New York claiming that he was improperly denied the opportunity to seek discretionary relief from an Order of Removal. The court then issued a stay of deportation on January 14, 2002 and subsequently

transferred the case to this District on February 5, 2002.[2]

II. DISCUSSION

Archibald does not contest the IJ's finding that he is deportable, nor does he challenge that his convictions render him an "aggravated felon" for the purposes of the INA. Rather, Archibald's complaint lies with final order of deportation issued by the IJ and affirmed by the BIA on August 18, 1997. First, Archibald contends that the finding of the IJ that he was ineligible to seek relief from deportation under section 212(c) of the INA was erroneous due to the improper retroactive application of section 440(d) of the AEDPA. See Pet'r Mem. in Support of Mot. Habeas Corpus (filed under Civ. A. No. 01-07663, E.D.N.Y. Dec. 20, 2001), at 1. Second, Archibald contends that he was denied a reasonable opportunity to obtain counsel to represent him during his deportation proceedings. See Original Pet. (filed under Civ. A. No. 01-7663, E.D.N.Y. Nov. 13, 2001), Ground 2. Finally, Archibald challenges the authority of the INS to detain him pending his deportation. See Pet'r Mot. Change Custody Status. The Court will review each issue in turn.

[2] The Government contends that the case was "transferred to the wrong District" since Archibald is now detained at the Pike County jail in Hawley, Pennsylvania. See Gov's Resp. to Pet. for Writ of Habeas Corpus, at 6 n.4 (filed under Civ. A. No. 02-0722, E.D. Pa. March 19, 2002). However, the Government has waived the personal-jurisdiction defense "in light of the posture of the case." Id. Accordingly, the Court will address the merits of Petitioner's Motion.

A. Section 212(c) Waiver

First, Archibald contends that he was wrongfully denied section 212(c) relief based on the IJ's improper retroactive application of section 440(d) of the AEDPA, a decision which the BIA affirmed on August 18, 1994. See Pet'r Mem. in Support of Mot. Habeas Corpus (filed under Civ. A. No. 01-07663, E.D.N.Y. Dec. 20, 2001), at 1. In order to evaluate the merits of Archibald's claim, the Court must first review the history of section 212(c) of the INA and its subsequent amendment by the AEDPA and appeal by the IIRIRA in 1996.

1. Statutory Background

The INA provides that an alien convicted of an "aggravated felony" at any time after admission to the United States is deportable. See 8 U.S.C. § 1227(a)(2)(A)(iii). Initially, section 212(c) of the INA granted the Attorney General broad discretion to waive deportation in cases where the alien had accrued seven years of lawful permanent residence in the United States. See 8 U.S.C. § 1182(c) (repealed 1996); see also INS v. St. Cyr, 533 U.S. 289, 293, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In 1990, Congress amended section 212(c) of the INA to preclude any alien convicted of an aggravated felony who had served a term of imprisonment of at least five years from the discretionary relief afforded under section 212(c). See § 511, 104 Stat. 5052 (amending 8 U.S.C. § 1182(c)); see also Scheidemann v. INS, 83 F.3d 1517, 1519 (3d Cir.

1996). Then, in April 1996, Congress enacted the AEDPA, which significantly amended the INA by "reduc[ing] the size and class of aliens eligible for such discretionary relief." St. Cyr, 533 U.S. at 297. Specifically, section 440(d) of AEDPA eliminated the discretionary waivers of deportation for those aliens deportable by reason of having committed an aggravated felony or a drug offense. See id. Finally, in September of 1996, Congress enacted the IIRIRA, section 304 of which repealed section 212(c) entirely, replacing it with a procedure called "cancellation of removal." See 8 U.S.C. § 1229b (1996).

2. Retroactive Application of Section 440(d) of the AEDPA

In his Petition, Archibald seeks relief based on the fact that section 440(d) of the AEDPA does not apply retroactively to deportation proceedings that commenced prior to April 24, 1996, the AEDPA's effective date. See Pet'r Mem. in Support of Mot. Habeas Corpus (filed under Civ. A. No. 01-07663, E.D.N.Y. Dec. 20, 2001), at 4. Archibald points out that both his criminal convictions and the deportation proceedings commenced prior to 1996. See id. Accordingly, he asks that this Court vacate the Order of the IJ and grant him a section 212(c) waiver hearing. See id. at 5.

In INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), the United States Supreme Court held that application of section 440(d) to aliens who pleaded guilty prior to AEDPA's enactment results in an impermissible retroactive effect. See 533

U.S. at 321-22. The Court first determined that Congress had not expressly prescribed that the AEDPA applies retrospectively. See id. at 318-19. Second, the Court concluded that applying the AEDPA to an alien convicted pursuant to a plea agreement entered into prior to the AEDPA's enactment would have an impermissible retroactive effect. See id. at 322-23. The Court explained

> Prior to AEDPA and IIRIRA, aliens . . . had a significant likelihood of receiving § 212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forego their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.

Id. at 325; see also Sandoval v. Reno, 166 F.3d 225, 242 (3d Cir. 1999) (concluding that "Congress did indeed express an intent that AEDPA's amendment to INA § 212(c) should not apply to cases pending on the date of enactment . . ..").

In the instant case, Archibald had been a permanent resident alien in the United States since 1982, well over the seven consecutive years of "lawful unrelinquished domicile" required under the INA. He plead guilty to offenses that constitute "aggravated felonies" under the INA on May 19, 1994. Thus, Archibald's guilty plea came two years prior to AEDPA's enactment in April of 1996. Section 440(d) of the AEDPA may not be applied retroactively to aliens who pleaded guilty before the AEDPA's enactment. See St. Cyr, 533 U.S. at 321-22. Accordingly, the IJ and the BIA were in error by finding that Archibald was not

entitled to relief under section 212(c) of the INA due to the retroactive application of section 440(d) of the AEDPA. Therefore, Archibald's request for section 212(c) relief must be evaluated under the law as it existed in May of 1994.

3. Section 212(c)'s Five-Year Bar

The Government does not dispute that section 440(d) of the AEDPA does not apply retroactively to section 212(c) waiver applications. See Gov's Resp. to Pet. for Writ of Habeas Corpus, at 5 (filed under Civ. A. No. 02-0722, E.D. Pa. March 19, 2002). Rather, the Government contends that "Archibald was ineligible for a Section 212(c) waiver for reasons that had nothing to do with the 1996 amendment of the AEDPA § 440(d)." Id. Specifically, the Government contends that, because Archibald was sentenced to and served more than five years in prison, he was ineligible for a section 212(c) waiver. See id. at 7.

As noted above, the former section 212(c) of the INA permitted lawful permanent residents with an unrelinquished domicile of seven consecutive years to apply for a waiver of deportation. See 8 U.S.C. § 1182(c) (repealed 1996); see also St. Cyr, 533 U.S. at 293. While the INA initially gave the Attorney General broad powers in granting discretionary relief, Congress amended the Act in 1990, adding additional restrictions to section 212(c). See St. Cyr, 533 U.S. at 294, 297. Under this amended provision, discretionary relief was not available for "an alien who has been

convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years." Id. (quoting § 511, 104 Stat. 5052 (amending 8 U.S.C. § 1182(c)). Therefore, under the 1990 amendments to section 212(c), an alien who has "been imprisoned for the felony for five years" is barred from applying for a section 212(c) waiver. Marmolejos v. INS, 69 F.3d 531 (Table), 1995 WL 639649, at *2 (1st Cir. Oct. 31, 1995) (unpublished disposition).

The Government seemingly makes two arguments regarding Archibald's eligibility for a section 212(c) waiver hearing under the law as it existed in 1994. First, the Government seems to contend that Archibald is not entitled to a section 212(c) waiver hearing because he was sentenced to a term of imprisonment of over five years. See Resp't Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus, at 15-16 (filed under Civ. A. No. 01-7663, E.D.N.Y. Jan. 30, 2002); Gov's Resp. to Pet. for Writ of Habeas Corpus, at 7-9 (filed under Civ. A. No. 02-0722, E.D. Pa. March 19, 2002). Under this theory, the Government contends that the fact that the INS initiated deportation proceedings before Archibald served five years of his prison term "does not entitle him to special consideration with regard to the five-year bar." Resp't Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus, at 15-16 (filed under Civ. A. No. 01-7663, E.D.N.Y. Jan. 30, 2002). In support of this assertion, the Government cites to the Second Circuit case of

Giusto v. INS, 9 F.3d 8, 10 (2nd Cir. 1993).

In Giusto, the Second Circuit reviewed an alien's equal protection challenge to the distinction set forth in section 212(c) "between aliens who have served at least five years in prison and those who have served shorter terms . . .." Id. at 9. In denying petitioner's equal protection challenge, the court found that Congress's selection of a five-year ban was rationally related to a legitimate governmental interest. Id. at 10. The court further rejected the petitioner's contention that the 1990 amendment to section 212(c) violated equal protection because it focused on the time a prisoner actually served rather than on the sentenced imposed. See id. The court found that "[t]he INS may well, with respect to an alien sentenced to five years or more, initiate deportation proceedings prior to his service of five years if necessary to comply with statutory requirement that such proceedings be commenced expeditiously." Id. The court concluded that "if a sentence is five years or longer, the mere fact that the INS initiated deportation proceedings early would not make the waiver available." Id.; see also Mezrioui v. INS, 154 F.Supp.2d 274, 279 (D. Conn. 2001) ("The Giusto decision suggests that it is the sentence imposed and served, rather than the timing of a hearing or a decision, that controls eligibility for 212(c) relief.").

It is undisputed that Giusto remains sound law for its

decision that the 1990 amendment to section 212(c) that imposed the five-year ban does not violate equal protection. However, this Court has not found, nor does the Government provide, a case where a federal court has held an alien ineligible for a section 212(c) waiver based solely upon the sentence imposed and not upon the time actually served. Rather, the district courts in the Second Circuit continue to deny petitioners a section 212(c) waiver hearing based on the time served in prison, not merely on the sentence imposed. See e.g., Cruz v. U.S. Dept. Justice, Civ. A. No. 00-0919, 2002 WL 986861, at *5 (S.D.N.Y. May 14, 2002) ("Since the BIA's decision is over 5 years from the date Petitioner began to serve his sentence, Petitioner is precluded from the relief he seeks under the terms of the statute as it existed at the time of his plea."); Gibson v. Ashcroft, Civ. A. No. 01-9400, 2002 WL 461579, at *3 (S.D.N.Y. March 26, 2002) (slip opinion) (finding erroneous retroactive application of section 440(d) of the AEDPA harmless because petitioner had served five years imprisonment by the time the BIA dismissed his appeal); Copes v. McElroy, Civ. A. No. 98-2589, 2001 WL 830673, at *5 (S.D.N.Y. July 23, 2001) ("[P]etitioner . . . had served more than five years' imprisonment by the time she was served with the order to show cause . . ., by the time the order to show cause was filed with the Immigration Court . . ., by the time the petitioner appeared before the IJ . . ., and by the time the IJ ordered the petitioner deported . . .."); Greenidge v. INS, Civ. A.

No. 00-1692, 2001 WL 1854514, at *5 (S.D.N.Y. Oct. 31, 2001) (granting petition for writ of habeas corpus because "but for the IJ's erroneous determination that petitioner was ineligible for Section 212(c) relief as a result of the 1996 amendments to Section 212(c), petitioner's claim could have been timely considered"); Mezrioui v. INS, 154 F.Supp.2d 274, 279 (D. Conn. 2001) (finding petitioner ineligible for a section 212(c) waiver because, by the time the BIA denied his appeal, he had actually served over five years in prison). Moreover, in Giusto itself, the petitioner had served six years before the INS commenced deportation proceedings, and thus the court did not find him ineligible for section 212(c) relief based on the sentence alone. See Giusto 9 F.3d at 9.

The Court agrees with the United States Court of Appeals for the First Circuit that "the five-year requirement applies to a 'term of imprisonment,' not to a 'conviction.'" Marmolejos v. INS, 69 F.3d 531 (Table), 1995 WL 639649, at *2 (1st Cir. Oct. 31, 1995) (unpublished disposition). As the First Circuit explained, "the ordinary usage of the phrase 'term of imprisonment' refers . . . to time actually spent in prison for a particular offense." Id. To deny an alien a section 212(c) waiver based solely upon the sentenced imposed rather than the time served contravenes the plain language of the statute itself. Specifically, the 1990 amendment to section 212(c) made waivers unavailable to "an alien who has been convicted of one or more aggravated felonies and has served

for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. § 1182(c) (repealed 1996) (emphasis added). If Congress intended to base the denial of discretionary waivers solely upon an alien's sentence, then the amendment could have easily been so written. But, instead of providing that "an alien who has been sentenced to a term of imprisonment of at least five years" is not entitled to discretionary waiver, the act specifically limited discretionary waivers to those who have "served" at least five years. See 8 U.S.C. § 1182(c) (repealed 1996). Moreover, in spite of the Giusto decision, the Second Circuit has recently held that section 212(c)'s five year bar "turns not on the sentence imposed but on the period of actual incarceration." United States v. Ben Zvi, 242 F.3d 89, 99 (2d Cir. 2001); see also, Matter of Ramirez-Somera, 20 I & N Dec. 564, 566, 1992 WL 301623 (BIA Aug. 11, 1992) ("The plain language of section 212(c) . . . bars such relief to any alien who . . . 'has served,' not merely been sentenced to, a term of imprisonment of at least 5 years . . .").

At the time Archibald applied for a waiver, section 212(c) plainly barred discretionary relief to aliens who had served at least five years' imprisonment for one or more "aggravated felonies." See Scheidemann v. INS, 83 F.3d 1517, 1518 (3d Cir. 1996). Although Archibald's convictions qualified as aggravated felonies, he nevertheless would have been eligible for a waiver

under section 212(c) because, at the time his order of deportation became final, he had served only three years of his prison term.

Next, the Government seems to contend that Archibald is ineligible for section 212(c) relief because, as of the date of this Petition for a Writ of Habeas Corpus, Archibald has served well over five years imprisonment. See Gov's Resp. to Pet. for Writ of Habeas Corpus, at 10 (filed under Civ. A. No. 02-0722, E.D. Pa. March 19, 2002). Again, the Court has not found, nor has the Government provided, any case that instructs this Court to count the years Archibald has served in prison through the filing of his Habeas Petition when determining whether Archibald was entitled to section 212(c) relief. See Bosquet v. INS, Civ. A. No. 00-6152, 2001 WL 1029368, at * 3 (S.D.N.Y. Sept. 6, 2001)("[N]either the BIA nor the Second Circuit has determined whether time served in prison after an initial erroneous BIA decision is reversed should count toward the five year ban."). In Buitrago-Cuesta v. INS, 7 F.3d 291, 296 (2d Cir. 1993), the United States Court of Appeals for the Second Circuit held that, for purposes of determining whether the five-year bar to section 212(c) relief applies, an alien's period of incarceration accrues through and including the date that an administratively final order of deportation is entered by the BIA. The Second Circuit stated: "Just as we credit aliens for time spent in the country while an appeal is pending before the BIA so that they are eligible for § 212(c) relief, we will also consider the

time an alien spent in prison during the course of a hearing for purposes of rendering them ineligible for § 212(c) relief." Id. at 296. Accordingly, "[u]nder the five-year provision, 'an alien's period of incarceration accrues through and including the date that an administratively final order of deportation is entered against h[im].'" Gibson v. Ashcroft, Civ. A. No. 01-9400, 2002 WL 461579, at *3 n.3 (S.D.N.Y. March 26, 2002) (slip opinion) (quoting Copes v. McElroy, 2001 WL 830673, at *5 (S.D.N.Y. July 23, 2001)) (citing Buitrago-Cuesta v. INS, 7 F.3d 291, 296 (2d Cir. 1993)).

Here, the BIA affirmed the decision of the IJ on August 18, 1997 when it found that Archibald was "statutorily ineligible for [section 212(c)] relief" under section 440(d) of the AEDPA. See Resp't Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus (filed under Civ. A. No. 01-7663, E.D.N.Y. Jan. 30, 2002), Ex. 8. Thus, Archibald's order of deportation became final on this date. See Gibson, 2002 WL 461579, at *3 n.3. At this point, Archibald had served only three years imprisonment. In fact, at no point during the pendency of Archibald's removal proceedings did his term of imprisonment cross the five-year threshold. See Greenidge v. INS, Civ. A. No. 00-1692, 2001 WL 185414, at *3 (S.D.N.Y. Oct. 31, 2001) ("It is at least fairly arguable that petitioner should not forfeit the right to seek a Section 212(c) humanitarian waiver of removal solely as a result of an incorrect decision by the IJ."). Archibald's time in prison did not "pass the five year mark" until

1999, after both the IJ and the BIA rendered their decisions. See Bosquet, 2001 WL 1029368, at * 3. Therefore, Archibald was entitled to apply for a discretionary waiver of the Removal Order pursuant to the former section 212(c) of the INA as it stood before it was amended by the AEDPA and repealed by the IIRIRA. Thus, the Court grants Archibald's Petition for a Writ of Habeas Corpus on this ground and remands the case back to the INA for further proceedings.

B. Right to Counsel

Next, Archibald argues that he was denied a reasonable opportunity to obtain counsel to represent him during his deportation proceedings. See Original Pet. (filed under Civ. A. No. 01-7663, E.D.N.Y. Nov. 13, 2001), Ground 2. As the Government correctly points out, a deportation proceeding is civil in nature and therefore the Six Amendment right to counsel does not attach. See Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002); Xu Yong Lu, 259 F.3d 127, 131 (3d Cir. 2001) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984)). Nevertheless, the INA regulations require that the IJ advise an alien of his or her right to secure counsel of the alien's choice at the start of the hearing, as well as the availability of free legal services. See 8 C.R.F. § 240.48(a). After the IJ makes such a disclosure, the IJ must then require the alien to state whether he or she desires representation. See id.

In the instant case, the evidence of record demonstrates that the IJ acted in conformity with the INA regulations and provided Archibald ample opportunity to secure representation. First, at Archibald's initial deportation hearing on December 13, 1994, the IJ informed Archibald that he was entitled to have a lawyer represent him and that, if Archibald could not afford an attorney, the IJ would provide him with a list of free legal service agencies. See Resp't Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus (filed under Civ. A. No. 01-7663, E.D.N.Y. Jan. 30, 2002), Ex. 5, at 2. The hearing was then adjourned after Archibald indicated that he wanted time to hire counsel. See id. At Archibald's next appearance in immigration court, the IJ again advised Archibald of his right to counsel and provided him with a list of free legal service providers. See id. at 9-10. The IJ again adjourned the proceedings and informed Archibald that he could use the time during the adjournment to retain counsel. See id. at 10-26.

Thus, Archibald was repeatedly advised of his right to counsel by the IJ and the IJ's proceeding to the merits of Archibald's case at the third hearing does not provide grounds for habeas relief. Moreover, there is no showing by Archibald that a due process violation occurred since Archibald has provided no evidence that he was "prevented from reasonably presenting his case." See Uspango, 289 F.3d at 231. Therefore, Archibald's Petitioner for a Writ of

Habeas Corpus is denied on this ground.

C. Change of Custody Status

Archibald next argues that he is entitled to be freed from INS custody pending a final determination of deportation. See Pet'r Mot. Change Custody Status, at 2. Specifically, Archibald claims that "as a lawful permanent resident who[se] deportation and criminal conviction predate the enactment of the IIRIRA and the AEDPA, [he] is entitled to release from INS custody." Id. Archibald further contends that since his time in INS custody exceeds the ninety-day removal period provided by statute, his current custody status amounts to a violation of due process. See id.

Section 241(a)(1) of the INA provides that "the Attorney General shall remove the alien from the United States within a period of 90 days." See 8 U.S.C.A. § 1231(a). During this ninety-day removal period, an alien is to be detained in INS custody. See 8 U.S.C.A. § 1231(a)(1). After the conclusion of the ninety-day period, the alien may be held in continued detention pursuant to 8 U.S.C. § 1231(a)(6). Alternatively, the INS may release the individual under continued supervision, pursuant to the provisions of 8 U.S.C. § 1231(a)(3).

Here, Archibald has been held in INS custody since October 5, 2001, when he was released from the custody of the State of New York following the completion of his criminal sentence. Archibald

then filed the instant Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on December 20, 2001. Archibald, as of the date of this Memorandum and Order, has thus spend eight months in INS custody. In support of his argument that this time period violates due process, Archibald cites to the recent decision of the United States Supreme Court in Zadvydas v. Davis, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). In Zadvydas, the Supreme Court considered whether 8 U.S.C. § 1231(a)(6) (the "post-removal statute") "authorizes the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal." 533 U.S. at 682. The Supreme Court held that the post-removal statute, when read together with the Constitution, "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." Id. at 689. The Court emphasized that "it does not permit indefinite detention." Id. In reaching this conclusion, the Court distinguished post-removal-period detention from "detention pending a determination of removability or detention during the subsequent 90-day removal period," finding that the former has no termination point. Id. at 697.

The case at bar is factually distinguishable from that of Zadvydas. "Zadvydas addressed the constitutionality of section 1231(a)(6) in the case of aliens 'placed in deportation limbo

because their countries of origin had refused to allow [them] entrance.'" Powell v. Ashcroft, 194 F.Supp.2d 209, 212 (E.D.N.Y. 2002) (quoting Sango-Dema v. INS, 122 F.Supp.2d 213, 221 (D. Mass. 2000)). It did not discuss the constitutionality of the tolling of the removal period during the time of an alien's non-cooperation. See Guner v. Reno, Civ. A. No. 00-8802, 2001 WL 940576, at *2 (S.D.N.Y. Aug. 20, 2001). Here, Archibald's detention is a direct result of his seeking relief from deportation. "The sole reason that [Archibald] continues to be in the custody of the INS is the fact that he has asked for, and been granted a stay of deportation." Evangelista v. Ashcroft, Civ. A. No. 01-6126, 2002 WL 976216, at *4 (E.D.N.Y. May 7, 2002). Archibald is not "being held indefinitely beyond the removal period. Instead, he is being held pursuant to a stay the he has requested." Id. at *5. "Under these circumstances, he cannot be heard to complaint that the time period during which he has been detained constitutes a denial of due process." Id.; see also Worrell v. Ashcroft, Civ. A. No. 00-6174, 2002 WL 1340297, at *9 (W.D.N.Y. March 29, 2002) (finding alien's reliance on Zadvydas misplaced when "the only reason he has not been removed is that he has chosen to contest the final order of deportation"). Therefore, Archibald is not entitled to habeas relief on this ground. See Marcelus v. I.N.S, Civ. A. No. 01-2587, 2002 WL 80301, at *1 (E.D. Pa. Jan. 16, 2002) (slip copy) ("Petitioner cannot secure release from detention which has been

prolonged beyond the ninety-day removal period or presumptively reasonable six month period because of a judicial stay entered at his request to block his removal pending resolution of a habeas petition.").

III. CONCLUSION

Accordingly, for the foregoing reasons, the Court finds that Archibald's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 be granted to the extent of remanding Archibald's application for section 212(c) relief to the INS for further proceedings. Archibald's Petition is denied on all other grounds.[3]

An appropriate Order follows.

[3] On June 3, 2002, Archibald filed with this Court a "Motion in Support of Writ of Habeas Corpus (Docket No. 9). This motion, however, does not deal with Archibald's entitlement to a section 212(c) waiver, nor does it concern his deportation proceedings in any way. Rather, in his most recent Motion, Archibald challenges his conditions of confinement. Since the grounds for relief discussed in the June 3, 2002 Motion are distinct and separate from the Petition for a Writ of Habeas Corpus originally filed, the Court will not address the merits of Archibald's claim at this time. Archibald, however, may lodge the complaints listed in the June 3, 2002 Motion in a separate Petition if he so desires.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NIGEL VINCENT ARCHIBALD	:	CIVIL ACTION
	:	
v.	:	
	:	
IMMIGRATION & NATURALIZATION SERVICE	:	NO. 02-0722

O R D E R

AND NOW, this 1st day of July, 2002 upon consideration of Nigel Vincent Archibald's Petition for Writ of Habeas Corpus (Docket No. 2), the Government's Response to Archibald's Petition for Writ of Habeas Corpus (Docket No. 4), Archibald's Motion in Support of his Petition for Writ of Habeas Corpus (Docket No. 9) and Archibald's Motion for Change of Custody Status (Docket No. 8), IT IS HEREBY ORDERED that Petitioner's Motion is **GRANTED IN PART; DENIED IN PART**.

IT IS FURTHER ORDERED that Archibald's Petition for Writ of Habeas Corpus is **GRANTED** to the extent of remanding Archibald's application for section 212(c) relief to the INS for further proceedings.

IT IS FURTHER ORDERED that this case is hereby **REMANDED** to the INS for a hearing on the merits of Archibald's application for section 212(c) relief.

IT IS FINALLY ORDERED that Archibald's Petition for Writ of Habeas Corpus is **DENIED** on all other grounds.

BY THE COURT:

_____
HERBERT J. HUTTON, J.